

**JUDICIAL COUNCIL OF CALIFORNIA  
ADMINISTRATIVE OFFICE OF THE COURTS**

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San Francisco, California 94102-3688

**Report**

TO: Members of the Judicial Council

FROM: Court Technology Advisory Committee  
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DATE: September 3, 2004

SUBJECT: Electronic Court Records: Remote Public Access in Extraordinary  
Criminal Cases (amend Cal. Rules of Court, rule 2073) (Action  
Required)

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Issue Statement

The interim rule (Cal. Rules of Court, rule 2073.5) on remote electronic access allowed in extraordinary criminal cases has allowed courts to meet intense demands for information in a few select cases, but this rule has a sunset date of January 1, 2005. The courts' experience to date with the interim rule has provided valuable guidance to support a permanent rule. The proposed amendment to rule 2073 (public access) would provide a rule to allow courts to meet requests for information on extraordinary criminal cases, while continuing to respect the privacy rights and interests of parties, victims, and witnesses.

Recommendation

The Court Technology Advisory Committee (CTAC) recommends that the Judicial Council, effective January 1, 2005:

1. Amend rule 2073, to allow courts to make court records in extraordinary criminal cases available for remote electronic access; and
2. Repeal rule 2073.5.

The text of the proposed amendment and the rule to be repealed are attached at pages 10–14.

## Rationale for Recommendation

### **1. Background**

#### a. Rule 2073

In adopting rule 2073, the council sought to balance the public’s interest in convenient access to court records with the privacy concerns of victims, witnesses, and parties. To that end, electronic records in civil cases may be made available over the Internet. However, in criminal cases, courts could only provide remote electronic access to indexes, registers of actions and court calendars. If electronic criminal case records were created, access could be made available to the public at the courthouse, but not remotely. This approach provided electronic records (other than indexes, registers of action and court calendars) the same de facto privacy protection traditionally afforded paper records. The United States Supreme Court has characterized this protection as a “practical obscurity” that is attributable to the relative difficulty of gathering paper files.

When the council adopted rule 2073, it limited electronic access to criminal records at the courthouse for the following reasons:

- To limit access to sensitive personal information unrelated to adjudication, so that the potential risk of identity theft or other misuse is greatly reduced;
- To protect ongoing or future investigations in criminal cases, so that the safety of victims and witnesses is not compromised; and
- To prevent the compilation of individual criminal histories, so that public policy is not contravened.

A copy of the report to the council recommending rule 2073.5 (Report to the Judicial Council, “Public Access to Electronic Trial Court Records,” December 11, 2001) is attached at Appendix A.

#### b. Interim Rule 2073.5

The Judicial Council adopted interim rule 2073.5, effective immediately on February 27, 2004, to address several courts’ urgent need to meet extraordinarily high demands for information on high-profile criminal cases. The interim rule allows courts to provide remote electronic access to limited information in these cases, as an exception to the general rule allowing electronic access to criminal cases only at the courthouse. The interim rule will sunset January 1, 2005.

The council adopted rule 2073.5 so that courts that are inundated with requests for information may satisfy the extraordinary number of requests for court records without compromising their normal operations by using remote electronic dissemination of information. In these extraordinary high publicity criminal cases, the court records do not enjoy practical obscurity because of intense public discussion and media reporting. Thus, the information available in the court file no longer benefits from the obscurity of the files in the courthouse; rather, court documents are disseminated in the public arena of print and broadcast media and the Internet. The rule includes additional provisions to protect privacy through selection and redaction of court documents that may be provided electronically.

The interim rule provides that:

- The presiding judge or designee is to decide whether to allow remote electronic access.
- Remote electronic access can be allowed only if there is an extraordinary demand for case documents that significantly burdens court operations.
- Access may be allowed to all or a portion of the court records.
- The court is to take into account relevant factors, including the impact on the privacy of the parties, victims, and witnesses; the benefits and burdens on the parties of providing remote electronic access; and, the benefits and burdens for the court.
- Specified personal information should be redacted from the version of documents that are provided remotely, and the court may order parties to provide redacted copies of any document in the case.
- The court will post its order on its Web site and will send a copy to the Judicial Council.

During council debate on adoption of the interim rule, members expressed several policy and operational concerns. The policy concerns that were expressed included:

- That criminal case records would no longer be practically obscure;
- That redaction of court records would be unduly burdensome and too slow to be effective;
- That Web sites would be used inappropriately to save staff resources; and
- That it would be difficult for courts to limit the electronic posting of criminal case records to extraordinary cases of high publicity.

Members also expressed operational concerns, including:

- That electronic versions of a case document would be available indefinitely;
- That the cost of setting up and administering the Web site would be high; and

- That courts would lack the technical capability to manage a secure Web site.

A copy of the report to the council recommending rule 2073.5 (Report to the Judicial Council, “Access to Electronic Court Records: Interim Rule to Allow Trial Courts to Provide Access to Electronic Court Records in Selected Criminal Cases,” February 20, 2004) is attached at Appendix B.

#### c. Court Experience With Interim Rule 2073.5

Three courts, in three cases, have implemented the procedures under the interim rule, and all report it to be a success. All three courts are posting documents that have the private information listed in rule 2073.5(c) redacted. Two of the courts redact the information in-house; in one court, the parties redact the information. In all courts a cautious approach is followed, with multiple reviews of content by the judge, research attorneys, and other court staff before release to ensure that redaction is complete. No court reports inappropriate or erroneous posting of sensitive personal information. The information will eventually be removed from the Web site after the case concludes, as the Web site does not serve an archival purpose.

None of the courts has experienced any technical difficulties or computer security breaches, and the Web site development and operation has been a team effort with participation of the presiding and trial judge, court executive officer, and other administrators, as well as technology staff.

The courts report that posting these documents on the Internet has relieved them of a significant burden of responding to what was an extraordinarily high amount of requests for documents. They report that counter and telephone requests are all but eliminated. The practical experience is that the media and the public wait for the redacted documents to be posted on the Internet rather than requesting the documents directly from the clerk’s office.

Significantly, the cost of maintaining the Web sites has been considerably outweighed by saving in staff costs that would have been incurred answering thousands of requests for the same information. The Superior Court of Santa Barbara County has estimated the Web site resulted in a saving of between \$293,000 to \$444,000 over nine months of implementation.

Courts are implementing case specific Web sites cautiously. At least one court has declined to provide documents over the Web under rule 2073.5 even when requested. In that situation, news organizations requested that documents in a murder case be posted on a Web site. The reporters making the request asked for

the electronic access because of the convenience. The court declined because it was not a high publicity case and there were not overly burdensome requests for two documents. Similarly, Los Angeles has not implemented Web sites for several current cases that have generated significant publicity.

The table below summarizes court implementation of the interim rule.

	Santa Barbara	Fresno	San Mateo
Host	outsourced	in house	in house
Available to	media only	public	media only
Redaction by	Court	Court	Parties
Format	scanned paper	scanned paper	PDF

## ***2. Permanent rule 2073 provisions***

The proposed amendment to rule 2073 largely incorporates the provisions of the interim rule into the text of rule 2073 and repeals rule 2073.5, which will expire at the end of the year. The incorporated text has the same provisions for an individual determination, redaction, notice, and order. However, the proposed amendment varies from the interim rule in two aspects. First, to emphasize the highly unusual nature of criminal cases that would receive treatment under the rule, the committee has titled the subsection “Remote electronic access allowed in extraordinary criminal cases,” in contrast to the interim rule title of “individual” criminal cases.

The second variation from the interim rule is a clarification that Web sites created under this provision are not to be restricted to the media only. To that end, the proposed amendment states that the court may, in certain circumstances, allow “electronic access by the public” to documents in extraordinary criminal cases. A similar reference to the “public” is added to the advisory committee comment. “Public” is defined in rule 2072(c) to include “an individual” or the media. As discussed below, the invitation for comment that was circulated with this proposal invited comment on this issue, but none was received. Additionally, as is apparent from the chart above summarizing implementation of the interim rule, two of the three Web sites currently in use are restricted to the media only.

The committee recommends that the media should not be the sole beneficiary of these Web sites because it regards one of the purposes of remote electronic access to be increased public access to court documents. Thus, the committee concluded that access in this circumstance should not be limited to the media. An additional concern is that there may not be a valid distinction between allowing media access yet denying general public access. Finally, it may be difficult to determine whether an individual is truly a member of “the media.” For example, a Web site

may or may not be “the media.” The committee concluded that the courts should not make these distinctions and thus the rule should not limit access to a discrete group.

Staff recommends an addition to the advisory committee comment clarifying that a copy of the court’s order must be sent to the Office of the Secretariat at the Administrative Office of the Courts. Both this proposal and the interim rule require that a copy of the court order permitting remote electronic access be posted on the Web and sent to the Judicial Council. However, there is no indication to whom the copy of the order is to be sent. The staff proposed addition to the advisory committee comment would clarify that procedure.

### ***3. Policy Questions***

#### **a. Will allowing remote electronic access in extraordinary high publicity cases ease the burden on the courts?**

The interim rule was proposed and adopted to ease the burden on the courts in answering an extraordinary number of requests for information in high-profile criminal cases. Smaller or branch courts were particularly concerned about being able to maintain normal operations with such a case in their court. The procedures under the interim rule and the proposed rule place some additional duties on the court, notably the possible redaction of certain information from court documents (or ensuring that counsel has properly redacted the documents) and maintaining the Web site.

The experience under the interim rule has demonstrated that the Web sites are able to handle more than 100,000 requests for information with minimum impact on the workload of court staff. On the other hand, requests for documents at the counter has slowed to the point that demands are no greater than any other case. This, as noted above, has resulted in significant net cost savings for the Santa Barbara court.

Developing and maintaining the Web site has not been burdensome on the technology staff. Nor has redaction of private information from the documents. Redaction has been incorporated into the routine document review by judges and research attorneys. Thus, the courts have reported there is little additional time required to implement the procedure.

#### **b. Will allowing electronic access under the proposed amendments compromise privacy considerations?**

When the council debated adoption of the interim rule, several members raised concerns that privacy will be compromised. It is anticipated that amended rule 2073 would not compromise privacy because (1) the presiding judge is to consider privacy interests in deciding whether to permit extraordinary treatment; (2) the court selects which documents in the court file are posted on the Web site; and (3) sensitive personal information may be redacted before the electronic court documents are made remotely accessible. Additionally, experience prior to and during the interim rule indicates that there is no “practical obscurity” for court documents in these extraordinary high publicity cases.

Redaction results in greater privacy protection for the electronic documents that are available by remote access. The paper or electronic documents available at the courthouse are not redacted and may contain sensitive personal information as allowed by law or rule. Because the court has no control over subsequent use of documents obtained at the courthouse, anyone may copy information from a case file at the courthouse and disseminate it without restriction. If the court makes redacted versions of the same documents available on its own Web site, it can function to inhibit widespread release of unredacted documents.

CTAC recognizes and shares ongoing concerns about the effect on privacy of increased electronic access to court records in select criminal cases, and will continue to monitor the experience of courts with the amended rule. One member of the committee voted against a permanent rule because of these concerns.

c. Are the technology issues burdensome to courts?

Another focus of the council’s review of the interim rule was whether implementation was technologically practical. The experience with the interim rule shows courts have the technological ability to host the case materials on their own Web sites or they may contract out the hosting. The expense of maintaining a Web site is minimal compared to the cost of staff time required to respond to in-person requests for information in extraordinary criminal cases. Courts have not reported any greater level of attempted Web security breaches with these cases, so the widespread interest in these cases does not seem to represent a security threat to the courts’ technology.

d. Should access be limited to the media?

While media representatives may represent the largest group of persons requesting court documents in extraordinary criminal cases, they are not the only group who may have a high level of interest in such cases. Law professors and students, other academicians, judges and staff from other courts, members of the bar, independent writers, and court observers may be equally interested in following the events in a

case unfiltered by media interpretation. Moreover, as stated in rule 2070(b), the purpose of the electronic access rules is to provide enhanced “public” access to court records, not just media access.

Limiting remote electronic access to the media would be contrary to the public access aspect of the proposed amendment and the rules in the surrounding chapter (Cal. Rules of Court, tit. 5, div. IVb, ch.3). Additionally, by limiting access to media representatives, the court would be required to determine who represents the media. The advent of Web publishing makes this determination less obvious than in the past when print and broadcast were the only forms of mass communication.

Password-protected access to a court’s Web site is permitted under rules 2074(c) and 2076 as a means by which the court can collect cost-recovery fees or monitor that a user is accessing the records as instructed by the court. Nothing in this proposed amendment to rule 2073 would prevent a court from setting up a password-protected Web site for access to information on an extraordinary criminal case.

#### Alternative Actions Considered

One alternative that CTAC considered and rejected was to not have a permanent rule. The successful implementation of interim rule 2073.5 has demonstrated the need for an exception to rule 2073’s prohibition of remote electronic access to criminal case records. Staff in courts implementing the interim rule have been relieved of the burden of responding to numerous requests for information. The committee recognizes that because nearly all details of extraordinary criminal cases are publicized, such cases are not practically obscure, and rule 2073’s prohibitions do not protect the privacy of parties in such cases.

CTAC also considered converting the interim rule into a permanent rule. However, the committee has proposed two changes. As discussed above, the committee retitled the subdivision to emphasize that the rule applies to “extraordinary” criminal cases. Secondly, the committee clarified that the access under the rule is not limited to the media in subdivision (e).

#### Comments From Interested Parties

The committee received comments from eight parties, including judges, court executives and staff, and court reporters.<sup>1</sup> The Santa Barbara court executive officer reported on his court’s successful implementation of the interim rule, and supported a permanent rule.

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<sup>1</sup> A chart summarizing the comments and the committee’s responses is attached at pages 15–31.



Most other commentators were also supportive of the proposed amendment, and several suggested adding provisions already addressed in other rules in chapter 3. Because the proposed amendment was not presented in the context of all the rules in this chapter, the commentators may not have been aware of existing rules that address their concerns. For example, a few commentators were concerned that privacy rights would be compromised because more information would be available on the Web site than is available on paper court records, but rule 2070(c) does not create a greater right of access to electronic documents. Several court reporters were concerned that a court would post transcripts in violation of Government Code section 69955(d), but existing rule 2072(a) addresses this concern.

The committee also considered, and rejected, the recommendation by some commentators that the rule amendment be changed to allow media only, for the reasons discussed above.

The Joint Rules Subcommittee of the presiding judges and court executives advisory committees reviewed this proposal, recommends it, and expressed willingness to work on a “how-to” manual to assist courts in the future with setting up Web sites to address information requests on extraordinary criminal cases.

#### Implementation Requirements and Costs

Implementation costs would be limited to the cost of developing and maintaining a Web site for remote access and for staff time to redact or review party-redacted documents before posting. These costs would be more than offset by the cost of staff time saved by not responding to repeated requests for information about extraordinary cases. Rule 2076 provides that a court may impose fees for the cost of providing public access to its electronic records.

#### Attachments

Rule 2073 of the California Rules of Court is amended, effective January 1, 2005, to read:

**Rule 2073. Public access**

(a) – (d) \* \* \*

**(e) [Remote electronic access allowed in extraordinary criminal cases]**

Notwithstanding (b)(2), the presiding judge of the court, or a judge assigned by the presiding judge, may exercise discretion, subject to (e)(1), to permit electronic access by the public to all or a portion of the public court records in an individual criminal case if the number of requests for access to documents in the case is extraordinarily high and responding to those requests would significantly burden the operations of the court. An individualized determination must be made in each case in which such remote electronic access is provided.

(1) In exercising discretion under (e), the judge should consider the relevant factors, such as the following:

(A) The privacy interests of parties, victims, witnesses, and court personnel and the ability of the court to redact sensitive personal information;

(B) The benefits to and burdens on the parties in allowing remote electronic access, including possible impacts on jury selection; and

(C) The burdens on the court in responding to an extraordinarily high number of requests for access to documents.

(2) The court should, to the extent feasible, redact the following information from records to which it allows remote access under (e): driver license numbers; dates of birth; social security numbers; Criminal Identification and Information and National Crime Information numbers; addresses and phone numbers of parties, victims, witnesses, and court personnel; medical or psychiatric information; financial information; account numbers; and other personal identifying information. The court may order any party who files a document containing such information to provide the court with both an original unredacted version of the document for filing in the court file and a redacted version of the document for remote electronic access. No juror names or other juror identifying information may be provided by remote electronic access.

1           This subdivision does not apply to any document in the original court file;  
2           it applies only to documents that are available by remote electronic  
3           access.

4  
5           (3) Five days' notice must be provided to the parties and the public before the  
6           court makes a determination to provide remote electronic access under  
7           this rule. Notice to the public may be accomplished by posting notice on  
8           the court's Web site. Any person may file comments with the court for  
9           consideration, but no hearing is required.

10  
11           (4) The court's order permitting remote electronic access must specify which  
12           court records will be available by remote electronic access and what  
13           categories of information are to be redacted. The court is not required to  
14           make findings of fact. The court's order must be posted on the court's  
15           Web site and a copy sent to the Judicial Council.

16  
17           **(ef)** \* \* \*

18  
19           **(fg)** \* \* \*

20  
21           **(gh)** \* \* \*

22  
23           **(hi)** \* \* \*

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25                                   **Advisory Committee Comment**

26  
27           The rule allows a level of access by the public to all electronic records that is at least equivalent  
28           to the access that is available for paper records and, for some types of records, is much greater. At the  
29           same time, it seeks to protect legitimate privacy concerns.

30  
31           Subdivision (c) excludes certain records (those other than the register, calendar, and indexes) in  
32           specified types of cases (notably criminal, juvenile, and family court matters) from remote electronic  
33           access. The committee recognized that while these case records are public records and should remain  
34           available at the courthouse, either in paper or electronic form, they often contain sensitive personal  
35           information. The court should not publish that information over the Internet. However, the committee  
36           also recognized that the use of the Internet may be appropriate in certain criminal cases of extraordinary  
37           public interest, where information regarding a case will be widely disseminated through the media. In  
38           such cases, posting of selected nonconfidential court records, redacted where necessary to protect the  
39           privacy of the participants, may provide more timely and accurate information regarding the court  
40           proceedings, and may relieve substantial burdens on court staff in responding to individual requests for  
41           documents and information. Thus, under subdivision (e), if the presiding judge makes individualized

1 determinations in a specific case, certain records in criminal cases may be made available to the public  
2 over the Internet.

3 Subdivisions (ef) and (fg) limit electronic access to records (other than the register, calendars, or  
4 indexes) to a case-by-case basis and prohibit bulk distribution of those records. These limitations are  
5 based on the qualitative difference between obtaining information from a specific case file and obtaining  
6 bulk information that may be manipulated to compile personal information culled from any document,  
7 paper, or exhibit filed in a lawsuit. This type of aggregate information may be exploited for commercial  
8 or other purposes unrelated to the operations of the courts, at the expense of privacy rights of individuals.

9 Courts must send a copy of the order permitting remote electronic access in extraordinary  
10 criminal cases to: Office of the Secretariat, Executive Office Programs Division, Administrative Office  
11 of the Courts, 455 Golden Gate Avenue, San Francisco, CA 94102-3688.

Rule 2073.5 of the California Rules of Court is repealed, effective January 1, 2005.

**~~Rule 2073.5 Remote electronic access allowed in individual criminal cases~~**

~~(a) **Exception for extraordinary cases.** Notwithstanding rule 2073(b)(2), the presiding judge of the court, or a judge assigned by the presiding judge, may exercise discretion, subject to (b), to permit remote electronic access to all or a portion of the public court records in an individual criminal case if (1) the number of requests for access to documents in the case is extraordinarily high, and (2) responding to those requests would significantly burden the operations of the court.~~

~~(b) **Relevant factors.** In exercising discretion under (a), the judge should consider relevant factors, such as:~~

~~(1) The impact on the privacy of parties, victims, and witnesses;~~

~~(2) The benefits to and burdens on the parties in allowing remote electronic access, including possible impacts on jury selection; and~~

~~(3) The benefits to and burdens on the court and court staff.~~

~~(c) **Redaction of private information.** The court should, to the extent feasible, redact the following information from records to which it allows remote access under (a): driver license numbers; dates of birth; social security numbers; Criminal Identification and Information and National Crime Information numbers; addresses, and phone numbers of parties, victims, witnesses, and court personnel; medical and psychiatric information; financial information; account numbers; and other personal identifying information. The court may order any party who files a document containing such information to provide the court with both an original unredacted version of the document for filing in the court file and a redacted version of the document for remote electronic access. No juror names or other juror identifying information may be provided by remote electronic access. This subdivision does not apply to any document in the original court file; it applies only to documents that are available by remote electronic access.~~

~~(d) **Notice and comments.** Five days notice must be provided to the parties and the public before the court makes a determination to provide remote electronic access under this rule. Notice to the public may be accomplished by posting notice on the court Web site. Any person may file comments with the court for consideration, but no hearing is required.~~

~~(e) **Order.** The court's order permitting remote electronic access must specify which court records will be available by remote electronic access and what categories of information are to be redacted. The court is not required to make findings of fact. The court's order must be posted on the court's Web site and a copy sent to the Judicial Council.~~

1        ~~(f) —Sunset date. This rule is effective until January 1, 2005.~~

2  
3        ~~*Rule 2073.5 adopted effective February 27, 2004.*~~

**SP04-12**  
**Remote Public Access to Electronic Court Records in Extraordinary Criminal Cases**  
**(amend Cal. Rules of Court, rule 2073)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Mr. Alexander Aikman Management Consultant ABA Management Consulting Redding	A	N	<p>Agree with proposed changes.</p> <p>The development of a media web site in Stanislaus County for the Peterson case represents a paradigm shift in how courts respond to the physical crush and demands for information of the media associated with highly-publicized cases. As you no doubt have been advised, Stanislaus' approach to communicating with the media in notorious or "extraordinary" case now has been copied—in large part, verbatim—in San Mateo and Santa Barbara, as well as in Eagle County, CO. I have no doubt it also will be copied in other notorious cases, both in California and in other states. It is to the Council's credit that it is willing to adjust its rules to accommodate this new development.</p> <p>Two items in the rule as written give me pause, although the reasons for their inclusion are easily surmised.</p> <p>The first is subdivision (3), requiring five days' notice to the parties and public. My hesitancy about five days' notice is occasioned by the fact that the sooner a court can get its web site up and running, the easier it will be on court staff and management and on the public trying to use the courthouse. Immediate use of a web site also will facilitate the court obtaining control over what can be a very disruptive group reporters, producers, camera operators, cables, lights, etc.</p>	<p>Disagree that five days' notice is too long. The time is minimally adequate for any person to file a comment and for the court to make a determination.</p>

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				<p>In an article I am writing for Court Manager, the magazine of the National Association for Court Management, about how Stanislaus handled the media during the Peterson case, I offer some recommendations based on Stanislaus' experience. One is to have a "shell" of a web site ready in case a court should get a notorious case. Courts (and states) that follow that advice could add case-specific information within 24-hours or so and be ready to make the site available to the media within 24-48 hours of a complaint being filed. While even my recommendation would not eliminate the first-day crush, it would limit the crush to the first day. The rule as written risks the loss of a court week and maybe a calendar week, which is a long time in the context of these cases.</p> <p>The notice period allows interested parties to object. It is hard to imagine categories of people who would object other than family of a defendant and/or victim and, perhaps, a known witness. The rule accommodates those individuals' interests, however, so the comment period likely will produce only requests to expand what is offered from the file, not restrict or eliminate release of filed documents.</p> <p>Perhaps the rule could allow posting of a complaining document and the arrest warrant, subject to the limitations of subparagraph (2). That would allow the site to get up and running while the court</p>	



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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>considers comments on the electronic release of all other documents.</p> <p>The other area that might be reexamined is the requirement that notice of the court's order be posted on the court's web site (subparagraph (4)). In Stanislaus, the court and sheriff's office made a counter-intuitive choice to keep the media's web site private. It was not kept secret, in that citizens who called or visited the courthouse for information were referred to the non-password-protected site, but it was not publicized and the media were explicitly instructed not to publish the web site address. If the site is publicized by being put on the court's "public" web site, but then is password protected, as in San Mateo, what is the point of publicizing it? If the media's site is not password protected, there is a risk of visits to the site exceeding the server's capacity. Based on calls to the court in Stanislaus, this risk is low, but the "hits" on the site in Los Angeles or in the Bay Area might be greater and thus create some server-capacity issues. Putting the order into the hard-copy file and sending a copy to the Judicial Council would seem to meet the goals of subparagraph (4) without risking an overload on either the court's public web site or the separate site established for the media.</p>	Disagree. The court's order must be posted to the public Web site as the rule applies to the public. The rule is not intended to apply only to the media. Public posting provides a way for the public to monitor the process.
2.	Gary M. Blair Court Executive Officer Superior Court of California, County of Santa Barbara	A		<p>Agree with proposed changes.</p> <p>As the Santa Barbara Court was the Court that brought the need for this Rule amendment to the attention of the Judicial Council in the first instance,</p>	

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	Santa Barbara			<p>we deeply appreciate the Council’s prompt response, first with the “interim Rule amendment” and now with this proposed amendment of Rule 2073.</p> <p>We strongly agree with this Rule amendment, as proposed. We have had occasion to implement it, carefully following the form of the interim amendment, and have found it entirely feasible and effective in the, very high profile, Michael Jackson case. In that case we have already had more than 96,000 “hits” on the site, even with the trial not yet having commenced.</p> <p>Our “High Profile Special Press Information” website has been a great success, with many compliments from press representatives, thanks to the permission granted by the amended Rule. The process permitted under this Rule was essential to permit the court (rather than the media) to “drive the train” of press information in responding to the demands of a case such as Jackson. The absence of this would otherwise have caused this Court great additional information access efforts and potential costs.</p> <p>It is also important to note that this process has “leveled the playing field” for all media agencies, such that all media have concurrent access to the same information, due to our list-served e-mail notification of all registered press users, immediately and concurrently advising them of updates to the site.</p>	The rule is not intended to limit remote electronic access exclusively to the media.

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				We strongly support this Rule amendment, with our special appreciation!	
3.	Timothy Gee Management AnalystIII Superior Court of California, County of San Mateo San Mateo	AM		<p>Agree with proposed changes only if modified.</p> <p>Section (e) – We have a real concern with the clause “(3) the benefits of remote electronic access outweigh privacy interests of the parties, victims, witnesses, and court personnel.” Does this leave open the possibility that protection of victims and witnesses’ right to privacy may be outweighed by public interest? Isn’t it important that the confidentiality of the names of victims and witnesses be maintained to protect them? Language should be phrased so that their privacy is maintained and protected.</p> <p>Section (e)(2) – It is of utmost importance that the language that gives a court the option to order parties to provide a redacted version of the document being filed be kept in the final version. At these times when the court’s budget is cut, the courts are having to work with a reduced staff and as such do not have staffing to perform the redacting as suggested in the proposed rule. Courts should be given the option to make such orders to assist the court in protecting the privacy of those involved.</p>	<p>The committee acknowledges the concern that privacy may be compromised. The access rules in the chapter represent a balancing of the rights of access and privacy. The proposed rule does not modify any existing laws or rules that protect victim or witness privacy.</p> <p>Agree.</p>
4.	Ms. Kim Hubbard President	N	Y	Do not agree with proposed changes.	

**SP04-12**  
**Remote Public Access to Electronic Court Records in Extraordinary Criminal Cases**  
**(amend Cal. Rules of Court, rule 2073)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
	Orange County Bar Association Irvine			<p>Proposed rule 2073(3)(3) provides for five days' notice to the parties and public before the court makes a mass access determination. Although the rule gives such notice, it does not purport to give the defense or prosecution an opportunity to be heard on the issue. An opportunity to be heard is necessary if the court is to make its determination based upon all available information, including the ramifications release could have upon a party's right to a fair trial. If the court is to receive input from those seeking mass access to the records, the parties to the case should be provided with that input so each can counsel the court as the relative merits and failings of each. Without being provided documentation seeking mass access and an opportunity to be heard, the parties are denied due process. Because the rule will impact a defendant's right to a fair trial, there should be procedural safeguards in place enabling a defendant to make a record of his or her objections and recommendations as to what should or should not be released and why.</p> <p>Additionally, the proposed rule appears to permit anyone to file his or her comments with the court. It is respectfully recommended that the right to comment be more limited, as it is doubtful that this rule is intended to provide any/every person with a forum to give an opinion about the case.</p> <p>There are additional substantial flaws. The rule does not require judges to exercise their discretion in</p>	<p>Disagree. While a full adversary hearing will not be held, any person may file comments with the court for consideration under proposed rule 2073(e)(3).</p> <p>Disagree. Limiting public comment is contrary to the purpose of the rule to provide public access.</p> <p>Disagree. The rule provides maximum discretion to the presiding judge or</p>

**SP04-12**  
**Remote Public Access to Electronic Court Records in Extraordinary Criminal Cases**  
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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>certain matters, but only suggests factors to be considered. The proposed rule merely states that a judge “should” consider certain factors in determining whether to permit electronic access. (Proposed rule 2073(e)(1).) Once the decision has been made, the rule again merely suggests certain redactions of the records available for mass access. (Proposed rule 2073(e)(2).)</p> <p>Proposed rule 2073(e) states that the court “should, to the extent feasible, redact” certain information from records available to mass access. Among the items the court “should” redact are license numbers, dates of birth, social security numbers, Criminal Identification and Information and National Crime Information numbers, addresses and phone numbers of the parties, witnesses, and court personnel, medical or psychiatric information, financial information, account numbers, and other personal identifying information. It is respectfully suggested that these matters must be redacted to preserve privacy interests of all concerned.</p> <p>Penal Code section 1054.2 makes it a misdemeanor for an attorney to willfully disclose the address or telephone number of a witness or victim to anyone outside the defense team. If there is such a legitimate concern about this information getting out into the public that the voters saw fit to make its release a misdemeanor (Pen. Code § 1054.2, subd. (a)(3)), this information should not be released to the mass media</p>	<p>designee to address the extraordinary nature of the case.</p> <p>Existing rule 2070(c) applies to all rules in the chapter, including the proposed rule. Rules in the chapter do not create a right of access to records that are not otherwise accessible.</p> <p>This Penal Code section does not apply to the courts.</p>

**SP04-12**  
**Remote Public Access to Electronic Court Records in Extraordinary Criminal Cases**  
**(amend Cal. Rules of Court, rule 2073)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>just because the court did not find it feasible to not release the information. With identify theft as prevalent as it is, there is no excuse for the court ever permitting documentation containing an individual's social security number released through a mass access procedure. Proposed rule 2073(e)(2) is unacceptable in toto. If there is to be a procedure permitting mass access, that procedure must guarantee that such sensitive information is never released. "To the extent feasible" as a formula for release of information is unworkable and does not provide necessary safeguards, and makes the mass release of sensitive information inevitable.</p> <p>The proposed rule indicates that it applies only to "public" records, and the Advisory Committee Comment indicates that the proposed rule applies to "selected non-confidential court records," but the comment to the rule also states, in its first sentence, that 2073 actually allows a level of access that can be "much greater" than otherwise permitted. It is therefore also respectfully recommended that any subsequent version of the proposed 2073 indicate within its language that it does not take precedence over any sealing of records under Rule of Court 243.1 – the statute that currently details the procedures and conditions for the sealing of court records. Alternatively, it is respectfully recommended that the proposed rule's relationship to 243.1 be more explicitly fashioned.</p>	<p>By providing that the court may order a party to provide a redacted version of a document for remote electronic access, the rule will provide greater protection of sensitive personal information in the remote electronic document than is available in the unredacted paper document at the courthouse.</p> <p>Disagree. While remote electronic access does provide a greater quantitative level of access to court records in an extraordinary criminal case, it does not provide greater access to types of records than is allowed to paper documents at the courthouse, under existing rule 2070(c).</p>

**SP04-12**  
**Remote Public Access to Electronic Court Records in Extraordinary Criminal Cases**  
**(amend Cal. Rules of Court, rule 2073)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				The more publicity a case garners the more difficult the job for all parties selecting a jury. The proposed rule, by allowing for the provision of such wide access to the court's files when a criminal case catches the prurient interests of the media, will never make jury selection easier and will only make selection more difficult. It is respectfully suggested that, for this reason alone, the proposed rule is ill conceived.	Disagree. Proposed rule 2073(e)(1)(B) lists possible impacts on jury selection as a factor for the presiding judge or designee to consider in deciding whether to order remote electronic access.
5.	Hon. Patrick J. Mahoney Judge Superior Court of California, County of San Francisco San Francisco	A	N	Agree with proposed changes.	No response necessary.
6.	Ms. Arnella I. Sims President Los Angeles County Court Reporters Association Los Angeles	N	N	Do not agree with proposed changes.  The language of the proposed rule refers to access to "public court records." We must assume that includes the verbatim record of proceedings, which raises several areas of concern. High profile "extraordinary criminal cases" by their very nature require a heightened level of attention to sealed proceedings and other items that must not be released to the public.  The stenographic notes produced by the court reporters should be exempt from any provision that makes such notes publicly available due to the sensitive and confidential nature of some information contained therein. There is no method by which a court reporter can electronically delineate	Disagree. To the extent that records are not otherwise available to the public (rule 2070(c)), records will not be available on the court's Web site.

**SP04-12**  
**Remote Public Access to Electronic Court Records in Extraordinary Criminal Cases**  
**(amend Cal. Rules of Court, rule 2073)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>stenographic notes that have been ordered or are required to be sealed, redacted or prohibited from disclosure. If public access to such original notes were made available to the public, the integrity and security of the court's notes could be called into question.</p> <p>There are various types of proceedings that are often ordered sealed or are statutorily prohibited from disclosure, i.e., discussions related to juvenile proceedings, proceedings related to adoptions, domestic relations involving children, certain in-chambers conferences, hearings related to the identification of informants, testimony concerning trade secrets, information related to HIV/AIDS, Pitchess motions, Marsden motions, 402 hearing, and the list goes on. There is no provision in the proposed rule for dealing with limiting access to these sensitive proceedings.</p> <p>Code of Civil Procedure § 237 requires the redaction of personal identifying information of trial jurors. For many years we have urged adoption of a rule to absolutely require all jurors called for service to be assigned an identification number and that the assigned identification number must be used throughout the entire trial. There are still judges who prefer to use jurors' names, thereby necessitating the additional work and expense of redacting names and other identifying information from transcripts.</p>	



**SP04-12**  
**Remote Public Access to Electronic Court Records in Extraordinary Criminal Cases**  
**(amend Cal. Rules of Court, rule 2073)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>The majority of extraordinary criminal cases are prepared as daily transcripts. Pursuant to existing law, daily transcripts are not prepared in a redacted fashion. Redaction is not allowed until a verdict is recorded. Particularly in death penalty cases, the daily transcripts are prepared in an unredacted format. Once the jury has reached a verdict, redaction of the personal identifying information is required, thereby necessitating the court reporter to prepare a new redacted version of the daily transcript of voir dire or any other portion of the proceeding where personal identifying information has been stated on the record.</p> <p>If the public is allowed access to daily transcripts, personal identifying information regarding trial jurors will be distributed to any individual who chooses to access that information.</p> <p>Government Code § 69954(d) prohibits the court, among others, from selling or providing a copy or copies of a transcript prepared by a court reported except for internal use of as an exhibit pursuant to court order of rule and, therefore, prohibits the court from providing public access to transcripts prepared by court reporters.</p>	The court would not provide any information on a Web site that is prohibited by this Government Code section.
7.	Ms. Robin Sunkees President California Court Reporters Association Sacramento		N	<p>Agree with proposed change only if modified.</p> <p><b><i>Proposed amendment:</i></b></p> <p>This proposed amendment to Rule 2073 should</p>	See response to comment 6.

**SP04-12**  
**Remote Public Access to Electronic Court Records in Extraordinary Criminal Cases**  
**(amend Cal. Rules of Court, rule 2073)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>specifically not allow remote, (i.e. Internet) electronic access to any court reporter transcripts as this is prohibited by Government Code Section 69955(d).</p> <p><b><i>Rationale:</i></b></p> <p>Government Code Section 69955(d) states: “Any court, party, or person who has purchased a transcript may, without paying further fee to the court reporter, reproduce a copy or portion thereof as an exhibit pursuant to court order or rule, or for internal use, <b><i>but shall not otherwise provide or sell a copy or copies to any other party or person.</i></b>”</p>	
8.	Mr. Michael A. Tozzi Executive Officer Superior Court of California, County of Stanislaus Modesto	N	N	<p>Do not agree with proposed changes.</p> <p>The proposed changes are in red.</p> <p>Rule 2073. Public access</p> <p>(e) [<b>Media Management</b> – Remote electronic access allowed in <del>extraordinary</del> <b>high profile</b> criminal cases]</p> <p>Notwithstanding (b)(2), the presiding judge of the court, or a judge assigned by the presiding judge, may exercise discretion, subject to (e)(1), to permit electronic access <b>to the media</b> to all or a portion of the public court records in an individual case if <b>(1) national and local interest is significantly higher than normal coverage and the anticipated demand on staff will also be</b></p>	<p>Disagree. The proposed rule is not intended to apply exclusively to the media, nor is it only for the convenience of the court. Proposed rule 2073(e) and the advisory committee comment have been modified to reflect that the rule permits remote electronic access by the public.</p> <p>Restricting remote access to media representatives doesn’t serve the purpose of the rules in the chapter, which are intended to provide public access to court records by taking advantage of the benefits</p>

**SP04-12**  
**Remote Public Access to Electronic Court Records in Extraordinary Criminal Cases**  
**(amend Cal. Rules of Court, rule 2073)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p><del>above normal</del> (1 2) the <del>anticipated</del> number of requests for access to documents in the case <del>will be</del> is extraordinarily high, (2 3) responding to those requests would significantly burden the operations of the court, and <del>(3) the benefits of remote electronic access outweigh privacy interests of the parties, victims, witnesses, and court personnel. An individualized determination must be made in each case in which such remote electronic access is provided.</del></p> <p>(1) In exercising discretion under (e), the judge should consider <del>the relevant factors, such as:</del></p> <p><del>(A) The privacy interests of parties, victims, witnesses, and court personnel, and the ability of the court to redact sensitive personal information;</del></p> <p><del>(B) The benefits and burdens on the parties in allowing remote electronic access, including possible impacts on jury selection, and</del></p> <p><del>(C A)</del> (A) The benefits to and burdens on the court and court staff.</p> <p><del>(3) Five days' notice must be provided to the parties and the public before the court makes a determination to provide remote electronic access under this rule. Notice to the public</del></p>	<p>of technology to foster in the public a more comprehensive understanding of the trial court system.</p> <p>Disagree. The philosophy underlying the public access rules in this chapter is the importance of balancing the rights of privacy and access.</p> <p>See response to comment 1.</p>

**SP04-12**  
**Remote Public Access to Electronic Court Records in Extraordinary Criminal Cases**  
**(amend Cal. Rules of Court, rule 2073)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p><del>may be accomplished by posting notice on the court Web site. Any person may file comments with the court for consideration, but no hearing is required.</del></p> <p>(4) The court's order permitting remote electronic access <b>to the media</b> must specify which court records will be available by remote electronic access and what categories of information are to be redacted. The court is not required to make findings of fact. <del>The court's order must be posted on the court's Web site and a copy sent to the Judicial Council.</del> <b>A copy of the Court's order shall be sent to the Chair of the Judicial Council.</b></p> <p><b>Advisory Committee Comment</b>  The rule allows a level of access to all electronic records that is at least equivalent to the access that is available for paper records and, for some types of records, is much greater. At the same time, it seeks to protect legitimate privacy concerns. Subdivision (c) excludes certain records (those other than the register, calendar, and indexes) in specified types of cases (notably criminal, juvenile, and family court matters) from remote electronic access. The committee recognized that while these case records are public records and should remain available at the courthouse, either in paper or electronic form, they often contain sensitive personal information. The court should not publish that information over the</p>	

**SP04-12**  
**Remote Public Access to Electronic Court Records in Extraordinary Criminal Cases**  
**(amend Cal. Rules of Court, rule 2073)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>Internet. However, the committee also recognized that the use of the Internet may be appropriate in certain criminal cases of extraordinary public interest where information regarding the case will be widely disseminated through the media. In such cases, posting of selected non confidential court records, redacted where necessary to protect the privacy of the participants, may provide more timely and accurate information regarding the court proceedings, and may relieve substantial burdens on court staff in responding to individual requests for documents and information. Thus, under subdivision (e) if the presiding judge makes individualized determinations in a specific case, certain records in criminal cases may be made available over the Internet. Subdivisions (ef) and (fg) limit electronic access to records (other than the register, calendars, or indexes) to a case-by-case basis and prohibit bulk distribution of those records. These limitations are based on the qualitative difference between obtaining information from a specific case file and obtaining bulk information on that may be manipulated to compile personal information culled from any document, paper, or exhibit filed in a lawsuit. This type of aggregate information may be exploited for commercial or other purposes unrelated to the operations of the courts, at the expense of privacy rights of individuals.</p> <p>Notes:</p>	

**SP04-12**  
**Remote Public Access to Electronic Court Records in Extraordinary Criminal Cases**  
**(amend Cal. Rules of Court, rule 2073)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>1. I would not amend 2073. I would create a new rule and title it <u>Media Access – High Profile Cases.</u></p> <p>2. During pretrial proceedings we received one public request for documents. That request was for autopsy photos. All other requests for documents and information were from various media sources.</p> <p>3. The five day notice is not practical. If the defendant is as well known as Michael Jackson, the media demand for information is predictable. Otherwise, media attention could happen overnight.</p> <p>This rule is not a public access rule. It is a media access rule. That will generate some interesting intellectual debate. The end result will not change the nature of the demand and the need for information: The Media.</p>	

# APPENDIX 1

## JUDICIAL COUNCIL OF CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS

455 Golden Gate Avenue  
San Francisco, California 94102-3660

### Report

TO: Members of the Judicial Council

FROM: Court Technology Advisory Committee  
Hon. Joanne C. Parrilli, Chair  
Charlene Hammitt, Manager, Information Services Division,  
415-865-7410, charlene.hammitt@jud.ca.gov  
Melissa Johnson, Assistant General Counsel  
Joshua Weinstein, Attorney

DATE: December 11, 2001

SUBJECT: Public Access to Electronic Trial Court Records (adopt Cal. Rules of Court, rules 2070–2076; repeal Cal. Standards Jud. Admin., § section 38)  
(Action Required)

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### Introduction

This report supplements the one submitted to the Judicial Council at its October 2001 business meeting. At that meeting, the council asked the Court Technology Advisory Committee and staff to provide answers to certain questions and deferred action on the proposed rules to its December meeting. Memoranda addressing the issues raised at the October meeting are attached to this report as Appendixes A through E.

Recently, the Court Technology Advisory Committee met and approved a set of revised rules. These revised rules are equivalent in substance to the advisory committee's original proposal but are improved in organization and clarity. In addition, the Advisory Committee Comments to the rules were reduced in length to provide only the information that is the most critical to understanding and applying the rules.

Because the council deferred action on this item, the advisory committee now recommends that the proposed rules go into effect on July 1, 2002, rather than

January 1, 2002, as previously proposed. The delayed effective date will give the courts time to learn about and comply with the rules.

### Recommendation

The Court Technology Advisory Committee recommends that the Judicial Council, effective July 1, 2002:

1. Adopt rules 2070–2076 of the California Rules of Court to establish (a) statewide policies on public access to trial courts’ electronic records that provide reasonable electronic access while protecting privacy and other legitimate interests and (b) statewide policies regarding courts’ contracts with vendors to provide public access to electronic court records.
2. Repeal section 38 of the California Standards of Judicial Administration.

The text of the proposed rules and the standard to be repealed is attached at pages 5–13.

### Summary of Major Provisions of the Proposed Rules

The rules apply to records that trial courts maintain in electronic form. They do not require courts to maintain any records electronically, but if a court does, the rules specify the requirements for providing public access to those records.

The rules require courts to provide electronic access to the following types of records to the extent feasible, both remotely and in the courthouse:

- Registers of actions and calendars in all cases; and
- Other records in civil cases (rule 2073(c)).

The register of actions includes the title of each cause, the date it commenced, “and a memorandum of every subsequent proceeding in the action with its date.” (Gov. Code, § 69845.) Thus, basic information about each case could be accessed through computer terminals at the courthouse or remotely (over the Internet).

Additional records in the following types of cases would be available electronically at the courthouse to the extent feasible, but not remotely:

- Family law;
- Juvenile;
- Guardianship or conservatorship;
- Mental health;
- Criminal; and



- Civil harassment (rule 2073).

If electronic access is not feasible because a court does not have the resources or technical capacity to provide it, the court must still make all of its electronic records available in some form—for example, by printing out copies of the information contained in electronic records (rule 2073(a)). However, the court may not provide electronic access to any part of a record that is sealed by court order or made confidential by law (rule 2073(a)).

When a court provides electronic access to records other than calendars, registers, and indexes, it may do so only on a case-by-case basis, using the case number, caption, or name of party to identify the record. Likewise, the court may not provide “bulk distribution” of its electronic records, other than registers, calendars, and indexes. “Bulk distribution” is defined as “distribution of all, or a significant subset, of the court’s electronic records.”<sup>1</sup>

#### Rationale for Recommendation

The rationale for the recommendation is contained in the October 2001 report and in the memoranda in Appendixes A through E, which address the following issues:

- A. What are the arguments for and against limiting electronic access to a case-by-case basis?
- B. Why should the rule prohibit remote electronic access (other than to the register and calendar) in case types other than civil?
- C. What are other jurisdictions doing to provide electronic access to trial court records?
- D. What is the electronic access environment in California courts?
  - What electronic access is offered by California courts?
  - Do California courts have the ability to provide remote electronic access?
  - What is being done to improve courts’ ability to provide electronic access?
- E. Has the Judicial Council adopted relevant plans and policies?

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<sup>1</sup> This definition of “bulk distribution” is based on the Justice Management Institute’s draft *Model Policy on Public Access to Court Records*.

### Comments From Interested Parties

The comments on the proposal as it circulated for comment are summarized in the October 2001 report. After the October meeting, a coalition of newspaper and press-related organizations, represented by Gray, Cary & Freidenrich, submitted a letter with additional comments in response to the October 2001 report and proposal. The Gray Cary letter is attached at Appendix F.

Most of the points in the letter have been addressed in the earlier report or in the materials in appendixes A and E. However, one objection raised requires clarification. Gray Cary objects to the “case-by-case” limitation on electronic access on the following basis:

The proposed rules would . . . prohibit access where, for example, a requestor wants to see the cases filed on a particular day and does not know the case numbers, captions, or parties. The requestor would not have the necessary data to submit a request that would comply with the rule, and even if he or she did the rule would not permit the requestor to obtain more than one case at a time. Similarly, a requestor who wanted to see all cases filed by or against a particular party and had the name of the party would be precluded from obtaining more than a single case. (Gray Cary letter, Appendix F, p. 2.)

This objection misinterprets the rule. First, a reporter who wanted to see all of the cases filed on a particular day could identify the names or numbers of those cases by accessing the register of actions, which would be available remotely for all case types and to which the case-by-case limitation does not apply. With the case names or numbers supplied by the register, the reporter could then access the files (if available electronically) for each of the cases filed.

Second, the rules would not prohibit a reporter from accessing more than one case involving a single party. It is contemplated that a search for cases by party name would produce a list of cases involving that party, each of which the reporter could access on a case-by-case basis.

## APPENDIX 2

### JUDICIAL COUNCIL OF CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS

455 Golden Gate Avenue  
San Francisco, California 94102-3688

#### Report

TO: Members of the Judicial Council

FROM: Michael Bergeisen, General Counsel  
Melissa W. Johnson, Assistant General Counsel  
Joshua Weinstein, Attorney, 415-865-7688, [joshua.weinstein@jud.ca.gov](mailto:joshua.weinstein@jud.ca.gov)

DATE: February 20, 2004

SUBJECT: Access to Electronic Court Records: Interim Rule to Allow Trial Courts to Provide Internet Access to Electronic Court Records in Selected Criminal Cases (adopt Cal. Rules of Court, rule 2073.5) (Action Required)

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#### Issue Statement

High publicity criminal cases offer significant challenges for the courts and court staff. As public interest rises, so do demands on court staff. In these cases, it is not uncommon for the court to have scores, if not hundreds, of requests for certain documents such as the complaint or motions. Courts are considering innovative solutions to ease demands on court staff, and posting case information on the Internet is one possible solution. While rule 2073 permits courts to provide remote (i.e., Internet) access to all electronic court records in individual civil cases, it excludes records in criminal cases.

#### Recommendation

AOC staff recommends that the Judicial Council, effective immediately and until January 1, 2005, adopt interim rule 2073.5, to allow courts in limited circumstances to post electronic court records in individual criminal cases.

The text of the proposed rule is attached at pages 8-9.

#### Rationale for Recommendation

##### **1. Background of rule 2073 and “practical obscurity.”**

When the council adopted rule 2073, it sought to balance the public’s interest in convenient access to court records with the privacy concerns of victims, witnesses, and parties. The rule prohibits courts from posting complete case records on the Internet. Under the rule, only the indexes, registers of actions, and court calendars in criminal

cases may be posted on the Internet. (See rule 2073(b) and (c).) Thus, the court may provide some case-specific information over the Internet, such as dates of hearing, assigned judges, and similar information. But most of the documents in criminal case files, such as motions, court orders, and clerk's minutes, cannot be made available over the Internet.

Rule 2073 prohibits courts from providing those criminal case records over the Internet even though they are not confidential and are available to the public at the courthouse. In adopting this rule, the council recognized that the "practical obscurity" of most court records provides individuals with some protection against the broad dissemination of private information that may be contained in public court records. Although court records are publicly available, most people do not go to the courthouse to search through records for private information, and in most cases that information is not widely disseminated. In contrast, if records are available over the Internet, they can be easily obtained by people all over the world. As the United States Supreme Court noted in a Freedom of Information Act case, there is a "vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the county, and a computerized summary located in a single clearinghouse of information." (*United States Department of Justice v. Reporters Committee for Freedom of the Press* (1989) 489 US 749, 764.)

The report to the Judicial Council that recommended adoption of rule 2073 noted several areas of concern if criminal case records were available over the Internet. (Report to the Judicial Council, "Public Access to Electronic Trial Court Records" (Dec. 11, 2001), at appendix B. A copy of that report is attached at pages 10-15.) The primary concerns were:

- Sensitive personal information (such as home addresses, phone numbers, and social security numbers), which might have no bearing on the merits of the case, could be made easily available, creating potential risks of identity theft or other misuse.
- Putting records on the Internet could jeopardize future criminal investigations and create safety risks for victims, witnesses, and their families.
- Allowing remote electronic access to all criminal case records would facilitate compilation of individual criminal histories, in contravention of public policy as established in statute.

For these reasons, the council declined to permit remote electronic access to criminal records, thus ensuring that those records remain practically obscure.

## **2. High profile cases are not practically obscure.**

Some cases generate such high levels of public and press interest that virtually every detail of the case is publicized. Almost every aspect of these high publicity cases, including the contents of the court file, is discussed on television and reported in the newspapers, and the court documents become available over the Internet. Thus, regardless of rule 2073's prohibitions on the court posting electronic court records in criminal cases, the information in these court files will be broadcast over the airwaves and the Internet and there is no practical obscurity.

Because non-confidential information in the case file must be made available to the public, court staff face considerable burdens in responding to requests for documents in these high publicity cases. As a result, several courts have asked the Office of the General Counsel of the Administrative Office of the Courts whether a Web site on which documents in an individual case are posted would violate the electronic access rules. Such a Web site would violate rule 2073. To address the difficulties faced by courts in managing high profile cases, the Court Technology Advisory Committee is developing amendments to rule 2073 that would allow courts in limited circumstances to post electronic court records in individual criminal cases on the Internet. The Committee plans to circulate a rule for comment later this year.

## **3. The proposed interim rule.**

While the committee's proposal is being developed, AOC staff proposes that the council adopt a similar rule on an interim basis.<sup>1</sup> Under the proposed interim rule, the court may allow remote electronic access to court records in a specific criminal case to alleviate the burden on the court if the case has generated an extraordinarily high level of public or press interest. Specifically, the rule provides that:

- The presiding judge or a judge assigned by the presiding judge is to decide whether to allow remote electronic access.
- Access may be allowed to all or a portion of the court records.
- Remote electronic access can be allowed only if there is an extraordinary demand for case documents that significantly burdens the operations of the court.

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<sup>1</sup> The Court Technology Advisory Committee considered recommending an interim rule, but declined to do so. The committee was not opposed to interim solutions but was not prepared to make such a recommendation until the proposed rule was fully vetted and approved for circulation by the committee. Specifically, the committee felt an appropriate interim solution was for the Judicial Council to approve case-specific waivers of rule 2073. For the reasons discussed in Alternative Actions Considered, staff is not recommending that the Judicial Council be involved in the decision-making process.

- The court is to take into account relevant factors, including the impact of the privacy of the parties, victims, and witnesses; the benefits and burdens of providing remote electronic access; and the benefits and burdens on court staff.
- Specified personal information should be redacted from the version of documents that is provided over the Internet, and the court may order parties to provide redacted copies of any document in the case.

As noted above, high publicity cases are dissected in the press; the contents of documents are discussed in newspapers and on radio and television and often are posted on the Internet, regardless of whether the court does so. Thus, the question is not whether the court documents remain practically obscure, but whether the court controls the release of its own records.

Under the proposal, the privacy concerns the council sought to protect when it adopted rule 2073, as discussed above, will be protected. Courts will redact personal information before releasing documents electronically. Because a decision whether to post criminal case records would only be made in individual, unusual cases, any safety concerns or law enforcement issues can be addressed in the individual case; for example, the court could decline to post particular documents that posed such a threat. And because only a relatively small number of cases would be posted, the proposed rule would not facilitate the compilation of criminal histories.

Nevertheless, the records will be redacted of the sensitive personal information the council sought to remain practically obscure. Because of the scrutiny these high publicity cases receive, regardless of whether the court allows remote electronic access, the authorities likely will not put such information in these records, anticipating that the records will be obtained and disseminated by the press. Therefore, the interim rule meets the needs of courts in managing high profile cases and is consistent with the rationale for the prior Judicial Council decision.

The Judicial Conference of the United States has endorsed a similar approach to the problem of access to documents in high profile cases. In 2001, the Conference adopted a policy on electronic access to court records, which recommended that remote electronic access not be available in criminal cases. (Judicial Conference Committee on Court Administration and Case Management, Report on Privacy and Public Access to Electronic Case Files (June 26, 2001), p. 8.) In March of 2002, the Judicial Conference decided to “amend its policy by allowing Internet access to criminal case files when requests for documents in certain ‘high profile’ cases impose extraordinary demands on a court’s resources.” (Administrative Office of the United States Courts, News Release,

March 13, 2002; see also Report of the Proceedings of the Judicial Conference of the United States, March 13, 2002, pp. 10-11.)<sup>2</sup>

We do not anticipate that this limited exception to the rule prohibiting remote access to criminal case documents will be applied routinely. As noted above, to invoke the rule, the court must find that there is an extraordinary demand for records that significantly burdens the operations of the court. Moreover, there is a significant burden on the court, as personal identifying and financial information in the court documents should be redacted prior to providing remote electronic access. Thus, courts will not be inclined to undertake redacting the records unless that task is significantly less burdensome than responding to public requests for documents. Because of the burden of redaction and courts' awareness and concerns about personal privacy, we expect that courts will carefully consider whether to provide remote electronic access under this rule and will do so only in those cases in which it is warranted.

#### Alternative Actions Considered

Several alternative versions of the interim rule were considered.

One alternative considered was to circulate the proposal for comment, rather than present the rule to be effective immediately. Circulating the proposal for comment would offer two benefits: (1) there would be additional time to consider the implications of the rule; and (2) the council would have the benefit of comments from interested parties. However, several factors weigh against circulating the rule for comment. First, three courts have been inundated with press requests in a few extremely high publicity cases and are urging an interim rule. Second, the rule would have limited application, as it would only apply in a few extraordinary high publicity cases. Third, the permanent proposal will benefit from the experiences under the interim rule, essentially operating as a pilot project.

The two variations on who should make the decision were considered: either (1) to have the Judicial Council approve case-by-case waivers of rule 2073 or (2) to have the trial judge, rather than the presiding judge, approve the exemption.

Under the first alternative, the council, rather than the presiding judge, would approve of cases that should be allowed to have Web sites. This alternative was not recommended for several reasons. While the decision is partly an administrative one—as it involves access to court records—it is also a case-specific decision. The council should not make these decisions, as it is not an adjudicative body. Moreover, because there are case-

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<sup>2</sup> The policy differs from this proposal in that Internet access is “permitted only if all parties consent and the trial judge or presiding judge of an appellate panel finds that such access is warranted.” (*Ibid.*) In addition, the federal policy does not appear to require redaction of personal information.

specific considerations, the trial court appears to be in a better position to make that determination.

The trial judge alternative was rejected because the Web site might be needed before a trial judge is assigned. Additionally, the decision requires consideration of both court administrative concerns, such as the impact on court resources, and case-specific concerns, such as the privacy of the parties, victims, and witnesses. As such, the trial judge may not in all cases be in the best position to make the decision. Thus, it is appropriate for the presiding judge to decide whether to make the determination him or herself, or whether to have it determined by a designee (who could be the trial judge if one has been assigned).

Several other alternatives were considered. Three that were not recommended were (1) make no change to rule 2073; (2) encourage courts to use surrogate agencies, such as the Sheriff's Department, to post these documents for the courts; and (3) amend the rule to allow posting of case documents in both civil and criminal cases.

The first two alternatives are not recommended because several courts have contacted the Office of the General Counsel desiring to have such Web sites, and to set them up correctly. Encouraging other agencies to post the documents undermines the purposes of rule 2073. It is preferable to have the courts control the content of the Web sites and to have that control sanctioned by the rules of court.

The third alternative, allowing posting of case documents in all criminal cases, was not recommended because the desire to ease the burden on courts in high publicity cases does not appear to be a valid basis to reverse the Judicial Council's previous decision not to broadcast personal and sensitive information over the Internet in criminal cases generally. Redaction of personal information would not be a practical solution if electronic access were permitted for all criminal cases.

#### Comments From Interested Parties

The proposal has not yet been circulated for comment. This temporary rule would be effective for the remainder of the year, while a permanent rule allowing Internet access to court records in certain individual criminal cases would be circulated for public comment.

The rule was reviewed by the Rules Subcommittee of the Trial Court Presiding Judges Court Executives Advisory Committees and their comments were considered in developing this draft. The subcommittee members supported the rule. Some thought that redaction of personal information should not be required because it is burdensome for the court. However, redaction of personal information would serve to protect the privacy concerns that led the council to adopt rule 2073. In addition, the burden of redaction will be outweighed by the reduced burdens to court staff in responding to requests for



documents. Finally, the court may order parties to provide redacted versions of documents for Internet posting.

#### Implementation Requirements and Costs

Implementation costs would be limited to the cost of providing the Web site for remote access and for redacting the records prior to posting. These costs would be offset by the benefit of freeing court staff from answering repeated requests and inquiries about these few high publicly cases.

Attachment